THIAM JOO (M) SDN. BHD.

v.

SYKT. ISDA SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C1-23-2919-1986]
29 MAY 1992

COMPANY LAW: *Winding-up - Winding-up order made before assignment crystallised - Priority over interest assigned.*

LANDLORD AND TENANT: *Absolute assignment - Whether can be cancelled or revoked - Contractual agreement that deed of assignment will be deemed revoked on happening of certain event - effect of.*

By a letter dated 24 December 1983, the second defendant accepted the tender submitted by the first defendant for the construction of a road project worth RM3,466,694. A formal contract was subsequently entered into on 17 April 1984.

The second defendant had agreed to pay to the first defendant on advance payment of RM300,000 before commencement of the agreed works provided repayment thereof was secured by a bank guarantee. At the instance of the first defendant, Bank Bumiputra ("the bank") Bhd. provided the said guarantee.

Clause 4 of the guarantee is as follows:

> The said sum which we guarantee to pay to Lembaga shall be reduced automatically in proportion to reductions made by Lembaga out of the progress payments due to the contractor for repayment of the advance payment so made. This Guarantee shall be cancelled immediately after the whole of the advance payment has been realised through payments by us or through deductions made out of the progress payments due to the contractor ...

To satisfy the bank that it would be indemnified if any call was made on the guarantee, the first defendant had placed certain moneys in a fixed deposit with the bank and its directors gave their personal guarantee. The first defendant further executed a deed of assignment which was undated but which was stamped on 6 August 1984 in favour of the bank in respect of "all monies, interest and rights now or hereafter became due and payable" to the first defendant by the second defendant under the said contract dated 17 April 1984.

As required by the bank, the second defendant had effected all progress payments due to the first defendant into the account at the Taiping branch of the bank.

On 21 April 1986, the first defendant had purported to give out assignment of its interest in the said contract in favour of the plaintiff.

The plaintiffs' claim against the first defendant is for goods sold and delivered. Plaintiff had obtained an order 14 judgment against the first defendant in this action. The plaintiffs claim against the second defendant is based on s. 4(3), Civil Law Act 1956 read with the deed of assignment dated 21 April 1986, notices of which was given to the second defendant twice on 2 May 1986 and 7 May 1986 which letter had been ignored.

Evidence disclosed that all progress payments except a sum of RM128,175.07 were paid into the first defendants' account at the bank and the first progress payment was for a sum of

RM532,780.22.

In the meantime, a winding-up petition was presented against the first defendant on 7 September 1987 and a winding-up order was made on 4 May 1988.

Held:

[1] The assignment made by the first defendant in favour of the bank was an absolute assignment.

[2] Reading the said deed of assignment and the bank guarantee, the parties envisaged that out of each progress payments due, a deduction could be made towards repayment of the said advance payment. The amount guaranteed was to be reduced automatically in proportion to the said deductions as and when the deduction was made and the guarantee was to be deemed cancelled after the whole of the advance payment had been realised.

[3] As at 21 April 1986 or as at 2 May 1986 and 7 May 1986, there is no evidence that the RM300,000 advanced had been repaid. It follows that on those dates at least the assignment to the bank clearly had priority over the other assignment. Certainly at least at that date, the second defendant was perfectly justified in ignoring the other deeds of assignment.

[4] In the case of an absolute assignment, it cannot be cancelled or revoked. If the bank agreed that some other party (including the Assignor) should enjoy the benefits of what had been assigned to it, it had in turn to assign its interest in the benefits of the contract to such other party.

[5] As there was no such reassignment, it follows that the second defendant had to continue, as it did, to recognise that the assignment to the bank continued to obtain. As far as the second defendant was concerned, it could not give recognition to later assignments while the earlier assignments continued to obtain.

[6] There was however nothing to assign because all interest in the contract that the first defendant had, had been assigned to the bank.

[7] However, as the winding-up order had intervened before those assignments or any of them could be said to have crystallised, the legitimate claimant to the money is the receiver of the first defendant company.

[Plaintiffs' claims dismissed with costs.]

Case referred to:

Nouvou Mont Dor (M) Sdn. Bhd. v. Faber Dvpt. Sdn. Bhd [1985] CLJ (Rep) 231 ***(cit)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

For the plaintiffs - T.F. Yee; M/s. Yee Teck Fah & Co.
For the defendants - R. Sanghvi; M/s. Kassim Tadin, Wai & Co

JUDGMENT

VC George J:

By a letter dated 24 December 1983 the 2nd defendant accepted the tender submitted by the 1st defendant to construct and complete the works known as Package 8A, Penang Bridge Project, Toll and Service Building Traffic Signing and Gantries for the total contract sum of RM3,466,694.

Subsequent to the acceptance of the 1st defendant's tender by the 2nd defendant a formal

contract dated 17 April 1984 was executed between 1st defendant and 2nd defendant.

The 2nd defendant had agreed to pay to the 1st defendant by way of an advance the sum of RM300,000 to be paid before the 1st defendant commenced the agreed works provided the repayment of that amount was secured by a bank guarantee. At the instance of the 1st defendant, Bank Bumiputra Bhd. provided the 2nd defendant with the required bank guarantee which guaranteed the payment on demand of the RM300,000. Clause 4 of the guarantee is as follows:

> 4. The said sum which we guarantee to pay to Lembaga shall be reduced automatically in proportion to deductions made by Lembaga out of the progress payments due to the contractor for repayment of the advance payment so made. This guarantee shall be cancelled immediately after the whole of the advance payment has been realised through payments by us or through deductions made out of the progress payments due to the contractor, or after the expiry of the period mentioned in Clause 5 (one year after the completion of the works), whichever is the earlier.

Apparently, to persuade the bank to give the said guarantee to the 2nd defendant, the 1st defendant had to satisfy the bank that it would be indemnified if any call was made on the guarantee. To that end the 1st defendant placed certain moneys in a fixed deposit with the bank, the 1st defendant's directors gave their personal guarantees guaranteeing the payment to the bank of any amount it was called upon to pay on the guarantee and the 1st defendant on or about 1 August 1984 executed a deed of assignment which was undated but which was stamped on 6 August 1984 in favour of the bank by which:

> the Assignor, (that is, the 1st defendant) assigns to the bank all monies, interest and right now or hereafter become due and payable to the Assignor by the Lembaga Lebuhraya Malaysia, (that is, the 2nd defendant) under the said contract

the contract being the said contract between the 1st and the 2nd defendants. The printed form of deed of assignment was designed for the situation where the consideration was the making of payments under a contract. The adoption of the form in this case where the consideration was the issue of the bank's guarantee has resulted in what can be mildly described as a convoluted document. However when it is carefully read in the context, it can be discerned that it has reference to the issuing of the guarantee in consideration of which the 1st defendant made the said assignment.

I pause to note that in respect of the status of this assignment, following the ratio in *Nouvou Mont Dor (M) Sdn. Bhd. v. Faber Dvpt. Sdn. Bhd.* [1985] CLJ (Rep) 231 the assignment was an absolute assignment.

Reading the deed of assignment and the bank guarantee it is seen that what is envisaged is that out of each progress payments due from the 2nd defendant to the 1st defendant in respect of the contract a deduction could be made towards repayment of the said advance payment. The amount guaranteed by the bank was to be reduced automatically in proportion to the said deductions as and when the deductions were made. The guarantee was to be deemed cancelled after the whole of the advance payment had been realised either by such deductions or by any other mode of repayment that resulted in the complete repayment of the advance.

As assignee of the payments due under the contract the bank had required, as it was entitled to, that the 2nd defendant effect all progress payments due to the 1st defendant into the 1st defendant's account No. 4909 at the Taiping branch of the bank over which presumably the

bank would have a measure of control.

Now, in each of the months April, May and July of 1986 the 1st defendant purported to give out assignments of its interest in the said contract between it and the 2nd defendant to certain of their other creditors. One of the two such assignments was in favour of the plaintiff. Particulars of all the said assignments are as follows:

	Assignee	Date of assignment	Date of Notice to 2nd def.
1st	Bank Bumiputra Sdn. Bhd.	undated but stamped	on or about 6 August 1984
2nd	Eastern Mobile Crane & Ang Sdn. Bhd.	3 April 1986	16 April 1986
3rd	Thiam Joo (M) Sdn. Bhd. (the plaintiff)	21 April 1986	2 & 7 May 1986
4th	Leong Decorators	4 April 1986	25 May 1986
5th	3M Malaysia	4 April 1986	12 July 1986

The plaintiffs' claim against the 1st defendant is for goods sold and delivered and the plaintiffs have in this action obtained an O. 14 judgment against the 1st defendant. Their claim against the 2nd defendant is based on s. 4(3) of the Civil Law Act 1956 read with the said deed of assignment of 21 April 1986 made by the 1st defendant in favour of the plaintiffs, notice of which was given to the 2nd defendant twice, on the 2nd and on 7 May 1986. The 2nd defendant had apparently ignored all the notices of assignment save that in favour of the bank which was chronologically the first.

According to Aziz bin Abdullah, a quantity surveyor with the 2nd defendant who testified on behalf of the 2nd defendant, the 2nd defendant had never received any letter from the bank countermanding the requirement that all progress payments were to be made to its Taiping branch and accordingly apparently all payments, save RM128,175.07, were so made.

Aziz bin Abdullah in cross-examination, having initially agreed with Counsel that upon payment to the bank of RM300,000 the guarantee is to be deemed cancelled and having agreed that the 1st progress payment that had been made to the Taiping branch of the bank was for RM532,780.22, went on to correct himself, as it were, by stating that inspite of that payment (and other progress payments that were later made) the guarantee was not "thereupon cancelled" because there was in fact a "formula for recouping the advance of RM300,000," no doubt referring to the fact that it was only that portion of the progress payment that was deducted (if deducted) by the 2nd defendant as repayment of the advance of RM300,000 that had the effect of reducing the quantum of the guarantee.

I again pause to note that as at 21 April 1986, (that is, the date of the assignment to the plaintiffs or as at 2 and 7 May 1986 (the dates when notice of the assignment had been given to the 2nd defendant) there is no evidence that the RM300,000 that had been advanced had been repaid. It follows that on those dates at least the assignment to the bank clearly had priority over the other assignments. Certainly at least at that stage, the 2nd defendants were perfectly justified in ignoring the other deeds of assignments.

Now, by letter dated 27 May 1986 the 2nd defendant informed the bank that the letter of guarantee given by the bank could be treated as cancelled. The bank did not however re-

assign what had been assigned to it by the deed of assignment. By a letter dated 7 May 1988 the bank explained to the solicitors for the 2nd defendant that it had assumed that since the guarantee had been cancelled the deed of assignment was deemed revoked. However it is on record that the 2nd defendants continued to act as if the deed of assignment continued to obtain. Two further payments due to the 1st defendants on the contract with the 2nd defendants were made into the Taiping branch account, one on 11 July 1986 and the other on 13 December 1986,

In the case of an absolute assignment, I fail to see how you can cancel or revoke it. Here there is no suggestion that the assignment was not a valid one. It seems to me that in the circumstances of the assignment being absolute and to take effect forthwith upon notice thereof being given to the 2nd defendant, and such notice having been given, the position vis-a-vis the assignment ceased to be executory. The assignment was complete. It has gone beyond the stage where it could be cancelled or revoked. If the bank agreed that some other party (including the Assignor) should enjoy the benefits of what had been assigned to it, it had in turn to assign its interest in the benefits of the contract to such other party. In the case of the Assignor, it would in effect be a re-assignment. There was no such re-assignment and it follows that the 2nd defendant had to continue, as it did, to recognise that the assignment to the bank continued to obtain.

In any event next in priority to the bank was Eastern Mobile Crane & Engineering Sdn. Bhd. No doubt its managing director had testified in Court in August 1991 that as a result of a "contraring" of accounts they were deemed to have been paid off by the 1st defendant and that therefore they had no further interest in the assignment. However the assignment was duly executed and notice of it had been duly given to the 2nd defendant. As far as the 2nd defendant was concerned it could not give recognition to later assignments while the earlier assignments continued to obtain.

There was however nothing to assign because all interest in the contract that the 1st defendant had, had been assigned to the bank. The money still held by the 2nd defendant that should have been paid to the 1st defendant if not for the assignment has to be seen to be held in trust by the 2nd defendant for the bank. If the bank holds money it does not want and does not want the money still with the 2nd defendant then it has to re-assign its interest in the contract to the 1st defendant.

A winding-up petition was presented against the 1st defendant on 7 September 1987, and a winding-up order was made on 4 May 1988. At that stage the bank not having effected any reassignment, the assignments in respect of the other assignees continued to be something that could take effect *in futuro*. However as the winding-up order has intervened before those assignments or any of them could be said to have crystallised, it seems to me that the legitimate claimant to the money if in fact the bank does not want it, is the receiver of the 1st defendant company (under winding-up). It is to be noted that the bank is not a party to these proceedings.

The claim of the plaintiff has to be and is dismissed with costs.

Also found at [1992] 3 CLJ 1763